

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
CACCAVALE, et al., , : 20-cv-00974-GRB-AKT
 Plaintiffs, :
 :
 - versus - : U.S. Courthouse
 : Central Islip, New York
 :
HEWLETT-PACKARD COMPANY, :
 et al., : January 12, 2020
 Defendants : 2:22 PM
-----X

TRANSCRIPT OF CIVIL CAUSE FOR PROCEEDINGS
BEFORE THE HONORABLE GARY R. BROWN
UNITED STATES DISTRICT JUDGE

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(Telephonically)

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1 THE CLERK: Calling case 20-cv-974, Caccavale
2 v. Hewlett-Packard Company, et al.

3 Counsel, please state your appearance on the
4 record.

5 MR. MOSER: Steven Moser for the plaintiffs.
6 Good afternoon, your Honor.

7 THE COURT: Good afternoon, Mr. Moser.

8 MR. PAGANO: Also Paul Pagano for the
9 plaintiff.

10 Good afternoon, your Honor.

11 THE COURT: Afternoon.

12 MR. HENNING: And your Honor, Kris Henning from
13 McCarter & English for defendants HP Inc., and Hewlett-
14 Packard Enterprise Company.

15 MS. LEVIN: And this is Ilana Levin from
16 McCarter & English, also for Hewlett-Packard Company and
17 Hewlett-Packard Enterprise Company.

18 MR. RUZAL: Good afternoon, your Honor.

19 For defendant Unisys Corporation, Jeff Ruzal of
20 Epstein Becker & Green.

21 MR. DIGIA: And Kenneth DiGia, also of Epstein
22 Becker & Green for Unisys Corporation.

23 THE COURT: Is that everyone? Sounds like it.
24 Okay.

25 I note we are here for a pre-motion conference

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1 and we are working under the most difficult of
2 circumstances because we are in the throws of the second
3 surge of the pandemic. So we're doing this by audio
4 conference.

5 In that regard, I did note that each party had
6 multiple counsel. I would ask you, to the extent
7 possible, to keep the speaker to one per side, just so we
8 can keep things straight, and also say your name when you
9 start speaking.

10 And I want to take this moment to remind
11 counsel of a particular rule in my individuals rules
12 which is this, anyone can make any motion they want,
13 That's not my rule, that's the law, but at a pre-motion
14 conference, I reserve the right to construe some or all
15 of the motion as actually being made based on the pre-
16 motion submissions, and the arguments of counsel. And I
17 might do that today. I find that under the present
18 circumstances, in order to try to keep things moving
19 efficiently, it could help.

20 So feel free to argue anything you want to me
21 today and make sure we get a clear record. So with that
22 in mind, between the two defendants, who would like to
23 start since it's your motions at issue?

24 MR. HENNING: Your Honor, this is Kris Henning
25 from McCarter & English for HP Inc. and Hewlett-Packard

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1 Enterprise Company. I'm happy to give a shot, start the
2 group.

3 THE COURT: Okay. And you're here for -- to
4 make a 12(b) motion, yes?

5 MR. HENNING: Yes, your Honor. A traditional
6 12(b)(6) motion, failure to state a claim. We have been
7 before your Honor before, so I don't want to assume too
8 much but also don't want to repeat for the Court some
9 prior briefs that all of us have put in.

10 Suffice it to say, the plaintiffs are former
11 employees of HP Inc., Hewlett-Packard Company or --
12 or/and Hewlett-Packard Enterprise Company, and there are
13 two claims asserted in the second amended complaint
14 against those defendants; one is a series of claim under
15 Sections 191 and 198 of New York Labor Law and another is
16 Section 195, a wage notice claim. We'll spend most of
17 our time today, I imagine on the 191, 198 claim.

18 Your Honor, the plaintiffs allege that they are
19 manual workers who were paid biweekly instead of weekly.
20 There's no allegation that they didn't receive the total
21 amount of wages they were supposed to receive.

22 THE COURT: Right. So let me ask you -- stop
23 you there for a second. They were paid biweekly, not
24 weekly. This is not an overtime claim. This is a
25 straight salary that was paid biweekly, correct?

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1 MR. HENNING: Yes, your Honor. And I should
2 say as to HP Inc. and Hewlett-Packard Enterprise Company,
3 my clients, there is no FLSA claim asserted in the case.

4 THE COURT: I mean, I don't need --

5 MR. HENNING: I will leave --

6 THE COURT: -- (audio interference) judgmental
7 sense, I -- just so I understand. I am familiar with
8 this provision of state law that says when it comes to,
9 I'll call it, a physical laborer, you need to pay them on
10 a weekly basis. So what's the basis for dismissing that
11 claim?

12 MR. HENNING: Your Honor, at the current stage
13 of things, we will accept that allegation as true, that
14 the plaintiffs are manual workers and further as you say,
15 Section 191 requires manual workers to be paid weekly and
16 not more than seven days after the end of the relevant
17 pay period.

18 Our motion says even assuming that is true, the
19 plaintiffs don't state a claim under the New York Labor
20 Law because Section 198 provides relief only to recovery
21 "underpayment" and it is our interpretation of that
22 statute that underpayment does not include a late
23 payment. Underpayment, the term commonly used, is --
24 means to be paid less than what is required or normal,
25 not later than some weekly due date.

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1 So the upshot of that, your Honor, is even if
2 you assume that the plaintiffs are manual workers for
3 current purposes, the statute does not permit claim to
4 seek liquidated damages, which is what the plaintiffs
5 seek, for only late paid wages, as opposed to nonpaid or
6 underpaid wages.

7 THE COURT: Let me make sure I fully understand
8 this because I do know that there are a number of cases
9 that have talked about this, and I've dealt with this a
10 little bit myself, I don't think I have written on it,
11 but are you suggesting to me though this provision of the
12 state law that says if you have a manual labor job, again
13 as you say (audio interference) accept this as true, I'm
14 not saying it is true but the allegation, right, that you
15 have to be paid on a weekly basis. The allegation is
16 that they weren't.

17 Are they without remedy all together, or are
18 you just trying to get a partial dismissal as to the
19 extent of the damages?

20 MR. HENNING: No, your Honor. We're seeking
21 dismissal of the entire claim. Your question is a good
22 one, our defendants who pay late, accepting for the
23 moment as true, the allegations completely immune from
24 any remedy? The answer is no, that's not our view of the
25 statutory structure.

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1 Section 218 of the New York Labor Law is where
2 you would go for -- to determine what the remedy is for
3 violations of the Labor Law other than violations that
4 allege a failure to pay wages.

5 And so the statute sort of divides into two,
6 198(1)(a) provides a remedy for liquidated damages for an
7 underpayment, that is the failure to pay the required
8 amount of the wages, but a defendant who pays or an
9 employer who pays late, under Section 191, the remedy for
10 that is Section 218 and that's for the Commissioner of
11 the Department of Labor, to fashion a remedy that can
12 take into account the equity that each particular case.

13 So in answer to your Honor's question, it is
14 not the case and it is not our position that employers
15 are free to pay late without recourse.

16 THE COURT: Okay. But the recourse, it goes
17 beyond my paygrade. It goes to someone else, is that
18 fair to say?

19 MR. HENNING: It -- well, I don't know if it
20 goes beyond your Honor's paygrade but it does go to the
21 Commissioner of the Department of Labor to seek civil
22 penalties in that instance and that's been the --

23 THE COURT: Okay.

24 MR. HENNING: -- practice of the New York
25 Industrial Board of Appeals as well, as in the past

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1 briefing and would again, should given the chance, a
2 number of decisions from that agency concluding that a
3 timeliness claim under Section 191 is remedied by the
4 Commissioner in Section 218 with civil penalties, as
5 opposed to liquidated damages under Section 198.

6 Now your Honor --

7 THE COURT: Now, counsel, if I --

8 MR. HENNING: -- (audio interference) --

9 THE COURT: -- find myself agreeing with you --
10 if I find myself agreeing with you, I'm not saying I do
11 on this particular school, but let's assume you're right,
12 is that all she wrote, as they say for your client? Is
13 that the only -- I mean, is that a complete defense for
14 you at this point?

15 MR. HENNING: On these claims, yes, your Honor.
16 On the 191, 198 claim, a conclusion that 198 does not
17 provide for liquidated damages for a claim based on late
18 paid wages that would, in our view, require dismissal of
19 those counts against our client.

20 There is another count against Hewlett-Packard
21 Enterprise, your Honor, that's the except 195 wage notice
22 claim.

23 THE COURT: Okay.

24 MR. HENNING: Our view of that one is that it
25 takes just a bit of an explanation first. So Hewlett-

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1 Packard --

2 THE COURT: You know what then, hold onto that
3 for one second. Hold onto that for one second because I
4 want to try to do this while I've got it sort of teed up.
5 So let me go to Mr. Moser. Mr. Moser, tell me --

6 MR. MOSER: I'd like to --

7 THE COURT: -- why aren't these wrong?

8 MR. MOSER: I'm sorry, Judge. I'd like Mr.
9 Pagano to handle it.

10 THE COURT: Okay.

11 MR. MOSER: I think he's --

12 THE COURT: Mr. Moser, I've never known you to
13 back down from a fight before, so I am surprised but
14 we'll hear from Mr. Pagano.

15 Mr. Pagano?

16 MR. PAGANO: I (audio interference) take it
17 that way, your Honor. We have had some discussions prior
18 to the call and I'm sure that Mr. Moser, as you know, is
19 more than capable of handling it but since I drafted
20 the --

21 THE COURT: Yes, yes, Mr. Pagano, I'm (audio
22 interference) for your welfare that perhaps he said this
23 isn't our best argument, you do this one in front of
24 Brown. The only thing I just wanted to see if maybe he's
25 throwing you in front of the judicial bus --

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1 MR. PAGANO: No, no, no.

2 THE COURT: -- but we'll see. We'll see.

3 MR. PAGANO: If anything, Steve is more likely
4 to be a shield than to push me in front of a bus but --

5 THE COURT: All right. So tell me why --

6 MR. PAGANO: -- I think if anything (audio
7 interference).

8 THE COURT: -- counsel's wrong about this.
9 Tell me why counsel is wrong about this.

10 MR. PAGANO: Yeah, I think most importantly the
11 Court just said that counsel is wrong about this. It's
12 my understanding that the decisional framework here,
13 certainly not to tell the Court how to act, but that
14 district courts are bound by decision of the highest
15 level of authority in state courts when apply state law.

16 The only case --

17 THE COURT: Right.

18 MR. PAGANO: -- we have on point here is Vega,
19 it's the only appellate division decision on case -- on
20 point rather. And it states explicitly that there are
21 both private, implied, and explicit private rights of
22 action for violations of New York Labor Law 191(1)(a),
23 the remedies of which are New York Labor Law 198,
24 including liquidated damages.

25 Further, Vega considered the exact argument

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1 that defendants are advancing and said, and I quote,
2 "Defendant's position that no private right of action
3 exists is dependent on its erroneous assertion that the
4 late payment of wages is not an underpayment of wages."

5 That is the guiding light, from the appellate
6 division to this court with respect to whether or not
7 there's a private right of action but we have more than
8 that. On the state court level --

9 THE COURT: Okay.

10 MR. PAGANO: -- we also have Rojas and Hi-Tech
11 Metals, which finds the same thing and most importantly,
12 several judges in the Eastern District, or perhaps
13 equally as importantly, has considered this issue and
14 found in favor of Vega and in favor of there being a
15 private right of action which include but are not limited
16 to the Kentania (ph.) case in which Judge Chen had
17 originally found against a private right of action, and
18 subsequently had the ability to revisit the issue and
19 said that even though she didn't necessary -- even though
20 she found it to be tortured, some interpretation of it to
21 be tortured, she still nevertheless recognized that she
22 had a duty to follow the state court's guidance, and that
23 -- also said that she found negatively persuasive.

24 And in fact very recently, within the last two
25 months, we've had a decision from Magistrate Judge Steven

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1 Locke, a report and recommendation, where he upheld Vega,
2 and referred that to Judge Seybert, who accepted the
3 report and recommendation in full, saying that amongst
4 other things, the cases on which the defendants rely on,
5 including Arciello (ph.), which was decided pre-Vega and
6 for which Judge Spatt did not have the benefit of Vega,
7 was -- she was not persuaded by it, and she disagreed
8 with her coordinate judge.

9 And then the other cases that plaintiffs rely
10 upon are -- you know, the Finkelstein (ph.) case is out
11 of a Suffolk County County Court and basically -- you
12 know, as we've briefed previously, the decision in that
13 case was tortured. It basically took a look at the IKEA
14 case out of the Second Department and said, we interpret
15 this to stand for the proposition that there's no private
16 right of action.

17 And cases such as Sorto (ph.), (audio
18 interference) discussing with -- between Judge Locke and
19 Judge Seybert said that case, the IKEA case on which the
20 plaintiffs rely and on which the Phillips (ph.) case
21 relied, did not discuss a private right of action.

22 And with respect to the New York Labor Law 218
23 issue, we briefed this before but just to reiterate,
24 there's nowhere upon our read of it, there's nowhere that
25 says New York Labor Law 218 is the exclusive remedy for a

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1 violation of 191.

2 In fact, if you look at New York Labor Law
3 218(4), it says that the remedies contained in New York
4 Labor Law 218 are additional and to be posed, you know,
5 along with other remedies.

6 And as far as the Industrial Board of Appeals,
7 you know, opinions are concerned, I'm not sure
8 necessarily how persuasive they are in light of all of
9 the state and federal laws (indiscernible) in the Eastern
10 District of New York but we provided the Court with the
11 case of Spero matter in which liquidated damages were
12 awarded when there was a 191 violation, and they were
13 discussed in the context of the unpaid wage order.

14 So as we see it, your Honor, we respectfully
15 submit that the decisional rubric here is Vega, unless
16 you're convinced that Vega is not -- I'm sorry, unless
17 you're convinced that the Court of Appeals would rule
18 differently, and to our knowledge, every single Eastern
19 District decision that has come out since Vega has found
20 in favor of Vega.

21 THE COURT: Okay. Let me go back to counsel
22 for HP for a second. In light of the decisions in Vega
23 by Judge Locke and by Judge Chen, and understand when it
24 comes to something like Labor Law, Judge Locke knows so
25 much more than I do, why shouldn't I follow those

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1 precedents?

2 MR. HENNING: Good question, your Honor. There
3 is a split of authority. There are as Mr. Pagano
4 mentioned, Arciello and a number of cases on our side,
5 Vega is certainly the case that the plaintiffs point to.
6 Here's our view of Vega. Vega's not binding on this
7 court. The New York Court of Appeals in the Second
8 Circuit have not spoken on the issue. Vega is a decision
9 from an intermediate appellate court in New York that is
10 not binding on this court.

11 If the plaintiffs wanted Vega to be binding,
12 they could've sued in the First Department in New York
13 State Court, they didn't do that. They sit here in front
14 of your Honor in the Eastern District of New York, it's
15 not binding.

16 I'm not here to say it has no role. As the
17 cases said, many of the cases referred to intermediate
18 appellate decisions as helpful indicators of what the New
19 York Court of Appeals might do. But the mode of analysis
20 is, we believe, for the Court to conduct a statutory
21 analysis here about what 191 and 198 does and doesn't do,
22 and then can use Vega and these other cases as reference
23 points. Some call it, you know, data points and decide
24 what the New York Court of Appeals would do.

25 We know what the New York Court of Appeals has

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1 told us about statutory interpretation. It's told us
2 that courts are to interpret statutes in a way that gives
3 effect to their plain meaning, and gives effect to each
4 of their provisions.

5 Our view is our interpretation does that, and
6 Vega does not. So to put it simply, your Honor, our view
7 is Vega is wrong, and because it's wrong, the Court is
8 not required to predict that the New York Court of
9 Appeals would follow an incorrect decision.

10 In a couple of respects, the Vega court
11 acknowledges the term "underpayment" is really the
12 linchpin of what we're talking about here but then says a
13 late payment can be an underpayment because according to
14 the Court in Vega, at the time payment is due, if it's
15 not made, it's a nonpayment, and therefore, late payment
16 equals underpayment.

17 A few thing about that, number one, there's no
18 explanation in the decision as to why a snapshot in time
19 of many months or years before the lawsuit was filed is
20 the right place to look. I mean, we can't simply ignore
21 other facts that came after that simply because they're
22 not good for the plaintiff.

23 That would also obliterate the idea of a late
24 payment. It would make every late payment a nonpayment
25 and that's contrary to our common sense experience.

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1 So Vega also says nothing about Section 218, so
2 it does not reject that portion of the argument we're
3 making here about an implied right of action. It says
4 nothing about 218, either does Scott.

5 So we -- our view of the world, your Honor, is
6 the New York Court of Appeals has said interpret the
7 statute to give effect to its plain meaning, ours does
8 that. There's no support in any New York Court of
9 Appeals decision we've seen, certainly none pointed out
10 in Vega that interprets the term under to mean timing, as
11 opposed to amounts. Number two, neither is there any New
12 York Court of Appeals authority that said in interpreting
13 the statute you should take a -- or any statute, you
14 should take a snapshot in time and ignore facts that
15 occur later but before the litigation is filed.

16 I think the cases that Mr. Pagano referenced
17 make this point. The post-Vega cases do things what I
18 think is in reverse. Instead of doing the statutory
19 analysis in deciding what's the right answer, and then
20 looking at other case law as guide, the simply defer to
21 Vega and treat Vega as if it came from the New York Court
22 of Appeals or the Second Circuit in which case it's not
23 permitted to be examined. Here, of course, it is.

24 Take Kintenea, for instance, as Mr. Pagano
25 said, Judge Chen candidly said the reasoning in Vega is

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1 tortured but that she was going to follow it.

2 Your Honor, to me, tortured means wrong and I
3 don't know how to read that other than concluding -- the
4 decision is wrong, but I'm going to follow it. That puts
5 Vega in the shoes of a decision from the New York Court
6 of Appeals or the Second Circuit but that's not where it
7 comes from. It comes from the New York Intermediate
8 Appellate Court is not required, and I would say
9 shouldn't be followed once you conclude that it's
10 tortured.

11 The Spero Industrial Board of Appeals decision
12 Mr. Pagano referenced is a nonpayment case, not a late
13 payment case, so it doesn't stand for the proposition
14 they assert here.

15 And Sorto, Sorto is consistent, I think, with
16 the other post-Vega decision. Judge Seybert there
17 doesn't really do the statutory analysis to determine
18 what 198(1) does and doesn't do, but rather sort of
19 engages in an identification of cases, identifies of
20 course, Vega, RCCL and the Max Finkelstein cases we cite,
21 and simply defers to Vega.

22 So that's a long way of saying --

23 THE COURT: Hold on a second. Are you
24 suggesting --

25 MR. HENNING: -- (audio interference).

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1 THE COURT: -- are you suggesting on that case,
2 on Sorto, are you suggesting it's Judge Seybert's
3 analysis or Judge Locke's analysis that you're disputing?

4 MR. HENNING: Well, Judge Seybert adopted the
5 report and recommendation.

6 THE COURT: Right.

7 MR. HENNING: And so the -- Judge Seybert's
8 analysis in that opinion, as I read it, sort of
9 identifies the cases on both sides and we concede there
10 are cases on both sides, and defers to Vega because it's
11 a First Department Appellate Division case.

12 One last word on that. The IKEA case that we
13 cited in our prior papers in our letter, I believe, comes
14 from the Second Department, and we believe IKEA is to be
15 read supporting our interpretation of 191, 198. There's
16 an Industrial Board of Appeals decision that is the sort
17 of starting point of IKEA, that concludes a 191 violation
18 but doesn't provide for liquidated damages.

19 The Industrial Board of Appeals would've had to
20 have imposed liquidated damages if it were a non -- if a
21 late payment were an underpayment, and it didn't.

22 One last thing, your Honor, by asking you to do
23 the analysis, statutory analysis that's required by the
24 New York Court of Appeals in the Second Circuit, and not
25 blindly defer to Vega, I don't think we're asking you to

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1 go out on a limb, we cited a Lychee (ph.) case in some
2 prior papers where the Second Circuit was -- showed no
3 hesitation to disregard a New York Appellate Division
4 decision that it thought was wrong.

5 There were other examples inside the Eastern
6 District of New York, as well, just two or three to
7 consider. New York -- City of New York v. Golden Feather
8 Smoke Shop comes from Judge Amon, 2009, 2009 W.L. 2612345
9 says, "New York Appellate Division decisions are
10 "helpful" indicators of how New York Court of Appeals
11 might rule, but predicated that the New York Court of
12 Appeals would reject an appellate division decision there
13 called Cayuga (ph.) because among other reasons, it
14 wasn't faithful to the plain language of the statute.

15 Likewise, Stevens v. Webb from the Eastern
16 District of New York, Judge Matsumoto, 2014, 2014 W.L.
17 1154246, rejects an appellate division decision called
18 Cunningham, and the quote there I think is particularly
19 on point here. Therefore, the Court of Appeals prior
20 precedence and the relevant statute's legislative history
21 provide persuasive data that the state's highest court
22 would not rule in accord with Cunningham.

23 We say same for here for Vega. The New York
24 Court of Appeals prior precedence are that the plain
25 language of the statute must be enforced and to do that,

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1 underpayment doesn't mean late payment.

2 THE COURT: Okay. So let me ask you a
3 fascinating question because you're really doing a great
4 job, at least everyone is, it's an interesting issue
5 obviously, it's a hot issue, right, because there are all
6 these decisions, is there anything sort of percolating
7 from a litigation standpoint, either at the Court of
8 Appeals or at the Second Circuit that right resolve this
9 for us?

10 MR. HENNING: Your Honor, good question. We
11 keep looking. We're not aware of the case before the New
12 York Court of Appeals or the Second Circuit in the
13 pipeline. There is the Max Finkelstein (ph.) cases that
14 we cite to the Court is on appeal to the Second
15 Department in the New York Appellate Division, but I'm
16 not aware, at least on our side, of anything in the
17 pipeline to the New York Court of Appeals or the Second
18 Circuit. I don't think Vega was appealed to the New York
19 Court of Appeals, so it ended there.

20 THE COURT: Got it. I was hoping that the
21 cavalry was rushing in but no luck. Okay. That's all
22 right. Okay. I think I've got my hands around this
23 issue, and let me just put it on the record while I have
24 it.

25 So it's a very interesting question. I've come

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1 across this question in a slightly different context, or
2 at least I've had some cases involving the statute about
3 late payment for manual labor is an interesting issue,
4 counsel's done a very good job with this, under very
5 difficult conditions.

6 As I said at the beginning, I do reserve the
7 right to deem a motion made based on the filings to date,
8 and I'm going to do that with this portion of the motion,
9 and that's for the following reasons. While I appreciate
10 HP's counsel's invitation for me to do the statutory
11 analysis in light of the absence of binding authority,
12 look at the reasoning of Vega to a certain extent, but
13 more importantly, the decisions by Judge Chen and Judge
14 Locke, both of whom are incredibly hardworking, dedicated
15 prudent jurists who have great familiarity with these
16 issues, I am persuaded by those opinions taken together
17 that right now, I am going to side with them. In other
18 words, I am going to find that there is a remedy and
19 therefore, I'm going to deny the motion to dismiss.

20 Obviously, to the extent that discovery shows
21 something different, and counsel had raised the issue
22 about whether or not these individuals were really manual
23 laborers and so forth, everything is on -- you know, is
24 open and should there be a decision from another binding
25 court, I'm always eager to hear from you again. So I'll

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1 close the door but not forever on this, so we can always
2 deal with this later.

3 So that's how I am going to rule on that
4 portion of the motion. Now counsel for HP, do you have -
5 - you had another piece that you wanted to tell me about
6 or that was it?

7 MR. HENNING: Your Honor, there is a second
8 count against HP, a wage notice claim but if the case
9 will proceed on the 191, 198 I don't think the scope of
10 discovery will be very different. I don't think the
11 additional count adds to the scope of discovery in the
12 case, so probably better to raise that later as well.

13 THE COURT: Counsel, let me say, thank you for
14 that. All right? In other words, as advocates we really
15 get sort of -- so bent on fighting a fight, that
16 sometimes it's better to say oh, let's put that fight
17 over for another day, so I greatly appreciate that. I
18 think this is a wise decision. So we'll put that off for
19 today, all right?

20 Which brings me to counsel for Unisys. You
21 have a motion as well, correct?

22 MR. RUZAL: That's correct, your Honor, and
23 this is Jeff Ruzal from Epstein Becker & Green speaking
24 for defendant Unisys.

25 THE COURT: Excellent. Now this may not be

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1 your whole motion, and I'm trying to keep all these
2 papers in front of me. In the virtual world it's harder,
3 because sometimes the window is closed and so forth.

4 But there's one part of your motion that
5 troubles me from the outset and maybe you can correct me
6 if I'm wrong, or maybe we have to do something a little
7 bit different but part of your motion at least, is
8 dependent on these releases that were purportedly signed
9 by two of the three plaintiffs, if I have that right.

10 MR. RUZAL: Yes, your Honor.

11 THE COURT: Okay. My question is, can we
12 review that issue on the 12(b)(6) motion? In other
13 words, doesn't that necessarily involve papers that are
14 outside the four corners of the complaint?

15 MR. RUZAL: Well, your Honor, it's my
16 understanding first off that Mr. Pagano in his moving
17 papers, or at least in his moving papers with respect to
18 the first series of the parties' attempt to move to
19 dismiss, that there was the agreement that Mr. Pagano
20 would withdraw such claims from those -- this individual.
21 So I don't know that there's further --

22 THE COURT: (Audio interference) done.

23 MR. RUZAL: -- scrutiny (audio interference)

24 THE COURT: Because it's done, yes?

25 MR. MOSER: This is (audio interference), your

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1 Honor. Mr. Ruzal is correct. The FLSA claims that
2 plaintiffs were discussing is only on behalf of Mr.
3 Sorbie, and similarly situated individuals which don't
4 include any of the other named plaintiffs, including Mr.
5 Billups who was added by virtue of the second amended
6 complaint.

7 THE COURT: Got it. Thank you. Sorry, I
8 missed that part. Okay. Good. I would've converted it
9 to a 12(c) motion anyway, but I just wanted to get that
10 straight at the beginning, so thank you.

11 All right. Back to counsel for Unisys, tell me
12 what else you would like to discuss today.

13 MR. RUZAL: Sure. Thank you, your Honor. So
14 just wanting to focus on the new FLSA claim in the second
15 amended complaint, if I may?

16 THE COURT: Yes, please.

17 MR. RUZAL: Thank you. The motion would be
18 again, the 12(b)(6), failure to state a claim and we have
19 a number of reasons that are sort of intertwined as to
20 why we think that plaintiff should not be able to go
21 forward with their FLSA claim, the first of which is
22 simply under Iqbal and Twombly standard -- the second
23 amended complaint simply fails to contain any pleading
24 that plaintiff is entitled to any relief under the FLSA
25 and the first supporting point for that is that the FLSA,

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1 nor its implementing regulations, provide for any such
2 relief, for any such claim.

3 If your Honor were to look at the regulations
4 at 29 CFR 778.106, which speaks to time of payment,
5 quoting, "The DOL states that there's no requirement in
6 the act in the FLSA that overtime compensation is to be
7 paid weekly."

8 The time of payment is not something that the
9 FLSA concerns itself with and while the DOJ has provided
10 guidance, or guidelines with respect to the prompt
11 payment of overtime, the regulations state that when the
12 correct amount of overtime compensation cannot be
13 determined until sometime after the regular pay period,
14 the requirements of the FLSA will be satisfied if the
15 employer pays the excess overtime compensation soon after
16 the regular pay period as is practical.

17 And so here, your Honor, we find ourselves
18 where plaintiff Sorbie had been paid his compensation one
19 day before the pay period ends, meaning that there could
20 be no way that overtime could even be calculated within
21 the same pay period because it had already been paid and
22 --

23 THE COURT: Right.

24 MR. RUZAL: -- because they pay on a current
25 biweekly basis, the overtime is paid within the next

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1 available paycheck and so for these reasons, again, one,
2 the FLSA does not set forth with respect to time of
3 payment, and then going with the DOJ's interpretive
4 guidance about paying as -- you know, what is reasonable
5 and practical, we believe that Unisys does that and this
6 is gleaned, I should add, your Honor, by the pay stubs
7 itself. This is not a matter where we would need some
8 ancillary evidence to prove this out.

9 So for those two reasons, we simply believe
10 that there's no basis for Mr. Pagano and plaintiff to go
11 forward with this FLSA claim.

12 THE COURT: Okay. Hang on. This sort of
13 dovetails with the first question I asked you on the
14 other claim, assuring not to be a viable issue anyway,
15 how does this fall into a 12(b)(6)?

16 MR. RUZAL: So there would be no relief that
17 the FLSA would provide for the late payment of wages.

18 THE COURT: Right, but once you say to me, not
19 so much the late payment -- well, that's one issue,
20 right, is there remedy for the late payment but if it's
21 paid within that reasonable time, when I hear that, don't
22 I automatically here well, that's going to be a factual
23 issue?

24 MR. RUZAL: If we're talking, your Honor, about
25 the interpretation of what's reasonable and what's not, I

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1 agree 100 percent but that's not what defendant Unisys is
2 -- the basis of its motion. The basis of its motion are
3 twofold; one, the plaintiffs' claim in its second amended
4 complaint, states that Unisys had the ability to pay
5 plaintiffs' overtime compensation on the regular pay date
6 for the period of time in which -- for such workweek
7 ends. That simply not factually accurate. That,
8 you know, plaintiff Sorbie was paid before the pay period
9 was ended, therefore there was no overtime compensation
10 that could be paid. That's not a question of
11 interpreting what's reasonable and what's not. That's
12 just a statement of it would be an impossibility that
13 overtime could be paid within that pay period, and that's
14 what the complaint states and there really is no (audio
15 interference) --

16 THE COURT: But counsel, when you say to me
17 that's not factually accurate, you know, isn't there some
18 part of your brain that's going to be I think that's a
19 summary judgment motion?

20 MR. RUZAL: Perhaps if we were to provide your
21 Honor, for example, some outside evidence that described
22 Unisys' payroll structure and the basis upon which it
23 formulates its decision to pay overtime or not. I'm just
24 stating, your Honor, that the complaint itself makes an
25 unsupported allegation and we don't believe that without

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1 that support, the claim could move forward. That's the
2 first part.

3 The second part --

4 THE COURT: Okay.

5 MR. RUZAL: -- is that the FLSA, your Honor,
6 simply does not provide for that relief, and we think
7 that likewise is a valid reason to make this motion at
8 this stage of the litigation.

9 THE COURT: Okay. Let's just talk about that
10 part for a second, just -- do I have the whole picture,
11 is there also a parallel state claim with that or no?

12 MR. RUZAL: Well, yes, your Honor, there is the
13 191 and 198 claim that was also brought against defendant
14 Unisys and --

15 THE COURT: Right.

16 MR. RUZAL: -- our -- look, our argument was
17 fully aligned with that of the HP defendants, which Mr.
18 Henning had made on the record.

19 THE COURT: Right.

20 MR. RUZAL: And there was (audio
21 interference) --

22 THE COURT: But I just want to make sure I have
23 the point, the point adequately sharpened.

24 MR. RUZAL: All right.

25 THE COURT: The point is that while there might

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1 be relief under the state law for that, there isn't under
2 the FLSA, yes?

3 MR. RUZAL: That's right, your Honor, and it's
4 not really -- I mean, it's an analog loosely speaking,
5 but it's a different issue than the New York Labor Law.

6 THE COURT: Right.

7 MR. RUZAL: Yes.

8 THE COURT: Okay. Well, done.

9 MR. PAGANO: May I, your Honor?

10 THE COURT: All right. Good. Yes, please.

11 MR. PAGANO: So obviously, some of this I agree
12 with Mr. Ruzal about and the mass majority of it we can
13 disagree about but the FLSA --

14 THE COURT: Let's take it from the top.

15 MR. PAGANO: -- (audio interference).

16 THE COURT: Let's start with the question, do
17 you have authority that suggests that the FLSA does
18 provide for this kind of relief?

19 MR. PAGANO: Yes, I mean -- yes, there is --
20 while the -- I'm sorry, I was about to get into that.
21 The FLSA requires prompt payment but it doesn't state
22 explicitly what prompt payment is. So what the courts
23 have done is they have relied in part on the Department
24 of Labor guidelines. What the Department of Labor
25 guidelines say is threefold.

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1 The first is, and this is the general rule, is
2 that overtime compensation is to be paid in a particular
3 workweek that you would receive your regular pay. If and
4 only if you cannot achieve that by virtue of the fact
5 that you can't do the calculation timely, or you can't
6 pay it timely, then it can be paid later but in no event,
7 later than the next pay period.

8 So what we have alleged in our complaint, your
9 Honor, is exactly that. We say that -- and I can give
10 you the paragraph citations in the second amended
11 complaint, and I'm sure your Honor doesn't want them at
12 this moment, but I can --

13 THE COURT: I don't, but thank you.

14 MR. PAGANO: -- it provides -- the complaint
15 mirrors exactly the regulations that -- the Department of
16 Labor regulations that courts have relied on. They claim
17 that Mr. Sorbie earned overtime in a particular week.
18 They claim that because he entered his overtime on every
19 Friday, that the defendants could have -- not just
20 overtime, his regular time every Friday, the defendants
21 could have paid him in a timely manner, and that they
22 have not done so, and that is as far as the pleading
23 standard -- we also gave the exact weeks in Mr. -- that
24 Mr. Sorbie was not paid timely and we gave the exact
25 amounts of hours -- or approximate amount of hours, 185,

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1 that he was not paid timely.

2 So under any pleading standard including
3 Twombly, I believe that the complaint is more than
4 sufficient for those purposes.

5 The other point that defendants have raised,
6 your Honor, you've already hit exactly on the head, okay?
7 It's a question of fact. Defendant is sitting here and
8 saying that they could not have paid him sooner, that
9 they could not have paid Mr. Sorbie sooner, and they
10 couldn't have calculated it sooner. They want us to take
11 that as a given without actually looking at what the
12 facts are, and we would submit to you, your Honor, that
13 by way of example that the way the biweekly pay period
14 works is let's say -- you don't have to use these exact
15 dates but just to give you an example, let's say we're
16 talking about the first two weeks of November, right? So
17 on the Friday of the first week of November, Mr. Sorbie
18 and the other similarly situated people, go in, they put
19 in their overtime, they put in the regular time, and at
20 that time, the defendants, at least it's our position,
21 and at worst it's a question of fact, have the ability to
22 determine the amount of overtime that he's worked for
23 that period, okay?

24 He then does the same thing on the next Friday,
25 so the second week of November. That Thursday, he is

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1 paid his regular pay in full, and he's paid any overtime
2 for the prior period, meaning the prior two weeks, not
3 that set of two weeks, but the prior two weeks.

4 We believe that the regulations in the case law
5 bear out that that's a violation of the FLSA and at
6 minimum, we feel that it's a question of fact that is not
7 resolvable on a 12(b)(6) motion.

8 THE COURT: Okay. So this is very curious to
9 me. The remedy for a nonprompt payment under your
10 analysis would be what? In other words, I owed him \$85
11 last week in overtime and I waited three weeks to pay it
12 and that's deemed not prompt.

13 MR. PAGANO: Right.

14 THE COURT: Is it treble damages, is there some
15 fixed fee or --

16 MR. PAGANO: It would be comparable to a remedy
17 under the New York Labor Law 191, liquidated damages,
18 attorney's fees, et cetera.

19 THE COURT: I mean, given the nature of the
20 statute and I have not read the Meadows v. Pleney (ph.)
21 cases, which I am embarrassed to say, I wish I had read
22 that before today, I find it extraordinary that courts
23 could read the statute to include remedies for fees that
24 aren't otherwise in the statute. How is that?

25 MR. PAGANO: And this is (audio interference) -

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1 -

2 THE COURT: In other words, how --

3 MR. PAGANO: I mean, I can't -- I can't speak
4 to why, you know, the judges have decided in the cases
5 that they've decided, other than to point you to the
6 cases that we have articulated and the regulations.
7 That's what the courts have interpreted. They have
8 required that payments be -- to the extent practicable,
9 be made in the same period, the overtime payments made in
10 the same period as regular pay, and the question as to
11 whether or not Unisys has achieved that as a question of
12 fact.

13 THE COURT: Wow. I mean, I understand --

14 MR. MOSER: And --

15 THE COURT: Go ahead.

16 MR. MOSER: If I may, your Honor, the appeals
17 courts have said that nonpayment of wages or late payment
18 of wages can be equally damaging to an employee, so --

19 THE COURT: I understand but that's not the
20 point, Mr. Moser, right? When I get a letter from your
21 office which says you know, due to the FLSA silence on
22 the issue, courts have decided this, I find that to be
23 extraordinary and that not -- not as easy as the first
24 issue we dealt with, let me put it that way, right? It's
25 a little bit trickier.

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1 Okay. What I am going to do then is I'm going
2 to ask counsel -- well, let me throw this out there for
3 both sides, if I give you the opportunity to brief this,
4 is there more authority I should be looking at other than
5 what's in your letters?

6 MR. PAGANO: I'm sorry, I didn't hear the end
7 of what your Honor said.

8 THE COURT: I'm sorry. I said if I give you
9 time to brief this issue, right, the issue about whether
10 or not -- okay, let me say this, I believe the question
11 of whether they could've paid more promptly, or if they
12 had the capacity, or they should have, (indiscernible)
13 factual issues, I'm not going to rule on that on a motion
14 to dismiss.

15 The only issue I'm interested is whether there
16 is actually this remedy under the statute. So if I give
17 you more time to brief that narrow issue, is there more
18 authority you would like to add, or is everything out
19 there in your letters?

20 MR. PAGANO: From the plaintiffs' side, I would
21 say that we would submit additional authority.

22 THE COURT: Okay. Counsel from Unisys, you
23 feel the same way?

24 MR. RUZAL: Yes, yes, your Honor, we'd like the
25 opportunity to further brief the piece specifically on

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1 remedy.

2 THE COURT: Right, that's the one issue I'm
3 interested in, does the statute provide for this remedy?
4 Because that, I do believe is appropriate for resolution
5 on a 12(b)(6) and if you get me your brief, I'll dig into
6 it. So how long would you like to do that?

7 MR. RUZAL: Your Honor, if we may have 30 days.

8 THE COURT: You know, it's a pandemic, it's
9 like a national emergency, so absolutely. 30 days is
10 fine with me. How about plaintiffs' will respond to
11 that, how much time would you like?

12 MR. PAGANO: Well, we'll take three weeks to be
13 fine.

14 THE COURT: Okay. Good, three weeks? And any
15 brief reply, and I mean very brief reply, I'm probably
16 not going to need much, a page or two, you could do a
17 week after that. Does that sound good?

18 MR. RUZAL: Yes, your Honor, thank you.

19 THE COURT: Sure. So you'll submit all of
20 those materials together for me in about 60 days, and
21 we'll dig into it. It sounds like a very interesting
22 issue.

23 Now having recognized that I am not going to
24 dismiss this on the basis of what I deem to be the
25 intertwined factual issues, but potentially only on this

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1 one issue, are there other issues we need to talk about
2 today, or did I get everything?

3 MR. DIGIA: This is Kenneth DiGia for Unisys,
4 your Honor, and I know you indicated you didn't want
5 multiple people speaking, I was wondering if I could just
6 make one point as it related to one point.

7 THE COURT: Sure. No, absolutely. Everyone's
8 doing great today. I just didn't want you interrupting
9 each other, so that's great. Thank you.

10 MR. DIGIA: Okay, thank you. I would like to
11 point out that plaintiffs' complaint is a little unclear
12 as to whether they are seeking relief for payment of
13 regular wages from Unisys under 191, 198, and we heard
14 everything your Honor said on that, but I would like to
15 make the point that given the way Unisys makes its
16 payments, it always pays those regular wages within seven
17 days of the end of the work week.

18 So even though it pays biweekly, since it pays
19 early, it always pays it within seven days of the end of
20 the work week.

21 THE COURT: Okay. So let's look at that --

22 MR. DIGIA: And that there would be no claim
23 under 191 for those wages against Unisys --

24 THE COURT: Right, but that --

25 MR. DIGIA: -- understanding what the Court

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1 said.

2 THE COURT: That to me again, falls squarely
3 into the area of something that has to be done on a
4 summary judgment motion. Now that doesn't mean we have
5 to have 15 years of extended fishing voyages before we
6 get there. If we want to sort of tee this up for more
7 limited motion, I'm happy to do that with you, you know,
8 giving over whatever discovery you need on those points,
9 but I am going to right now, let counsel work that out
10 because so far it sounds to me like you're working
11 together quite reasonably and I don't want to interfere
12 with that dynamic.

13 So I would urge you to meet and confer on that
14 issue and get back to me as to whether or not you could
15 resolve it, or if you want to try to tee it up for kind
16 of an expedite summary judgment on that point. That
17 sound fair?

18 MR. DIGIA: Yes, your Honor.

19 THE COURT: Okay. It's a good point. Thank
20 you.

21 Anything else anyone wants to bring up today?
22 All right, not hearing anything -- well, go ahead, sir.

23 MR. PAGANO: No, I was just going to say I
24 think that there's some discovery issues that the parties
25 will have to work with Magistrate Tomlinson in light of

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1 your Honor's rulings but I am sure we can figure that out
2 on our own.

3 THE COURT: And you are so fortunate, I might
4 add, to have Magistrate Judge Tomlinson because I was a
5 magistrate for many years, and she's much better than I
6 was at it. She's just -- you're very -- great. So, I am
7 sure that will be satisfactory.

8 I have a few other things for the parties,
9 which are please wear a mask, wash your hands, stay safe.
10 I'm hoping we're coming to the end of this terrible
11 period of our history and we'll have vaccines soon, I
12 hope, so stay well in the meantime, all right?

13 IN UNISON: Thank you, your Honor.

14 THE COURT: All right. Thank you. Everyone
15 did a fine job today. Thank you for your help. All
16 right? Be well.

17 (Matter Concluded)


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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 13th day of January 2021.


Linda Ferrara

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